

### **Rule 35. En Banc Determination**

**(a) When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

- (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions;  
or
- (2) the proceeding involves a question of exceptional importance.

**(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.

- (1) The petition must begin with a statement that either:
  - (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
  - (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.
- (2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.
- (3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

**(c) Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

**(d) Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

**(e) Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.

- (f) **Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

**Local Rule 35. En Banc Proceedings.**

**(a) Petition for Rehearing En Banc.** *A petition for rehearing en banc must be made at the same time, and in the same document, as a petition for rehearing. The request for en banc consideration shall be stated plainly in the title of the petition. Petitions for rehearing en banc will be distributed to all active and senior judges of the Court, and to any visiting judge who may have heard and decided the appeal.*

**(b) Decision to Hear or Rehear a Case En Banc.** *A majority of the circuit judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc. A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the Court or by a senior or visiting judge who sat on the panel that decided the case originally. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on a petition for rehearing will bear the notation that no member of the Court requested a poll. If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. A judge who joins the Court after a petition has been submitted to the Court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a case en banc.*

**(c) Decision of Cases Heard or Reheard En Banc.** *An en banc hearing will be before all eligible, active and participating judges of the Court. An en banc rehearing will be before all eligible and participating active judges, and any senior judge of the Court who sat on the panel that decided the case originally. An active judge who takes senior status after a case is heard or reheard by an en banc Court will be eligible to participate in the en banc decision. A judge who joins the Court after argument of a case to an en banc Court will not be eligible to participate in the decision of the case. A judge who joins the Court after submission of a case to an en banc Court without oral argument will participate in the decision of the case. Granting of rehearing en banc vacates the previous panel judgment and opinion; the rehearing is a review of the judgment or decision from which review is sought and not a review of the judgment of the panel. (The circuit takes the position that the change of wording in 28 U.S.C. § 46(c) referring to participation in en banc decisions does not alter the long-standing rule that the en banc court reviews the decision from which review is sought in this Court, not the decision of a panel.)*

**(d) Additional Copies of Briefs and Appendix for En Banc Hearing or Rehearing.** *The Court's order granting hearing or rehearing en banc may require the parties to file additional copies of the briefs and appendix. Each party will bear the initial cost of additional copies of its own briefs. The party that requested the hearing or rehearing en banc will bear the initial cost of filing additional copies of the appendix. In the event that cross petitions for hearing or rehearing en banc are granted, the parties will share equally the initial cost of preparing additional copies of the appendix.*

*Local Rule 35 amended March 31, 1993, March 9, 1994, December 4, 1996, December 1, 1998, December 1, 2003, and December 1, 2005.*